SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 451

WILLIAM WHITLOCK BRUSH, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 74815.

APPEARANCES BEFORE THE BOARD:

For Petitioner—MARK EISNER, Esq., JOSEPH L. WEINER, PAUL WINDELS, EDMUND L. PALMIERI.

For Respondent—JAMES H. YEATMAN, Esq.

Docket Entries.

1934

Feb. 6, Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 6, Copy of petition served on General Counsel.

Mar. 26, Answer filed by General Counsel.

Mar. 30, Copy of answer served on taxpayer.

Apr. 11, Hearing set May 21, 1934.

May 19, Order of continuance to May 24, 1934 entered.

Docket Entries.

May 24, Hearing had before Mr. Leech, Division 6, on merits.
Petitioner's brief due June 22, 1934. Commissioner's brief due 15 days later—petitioner's reply 10 days.
Appearance of Joseph L. Weiner filed.
June 2, Transcript of hearing May 24, 1934 filed.
June 22, Brief filed by taxpayer June 22, 1934 copy served.
July 6, Reply brief filed by General Counsel.

1935

June 14, Memorandum opinion rendered — Mr. Leech, Division 6, Judgment will be entered for Commissioner.
June 15, Decision entered, Mr. Leech, Division 6.
Sept. 9, Petition for review by United States Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.
Sept. 12, Affidavit of service of petition for service filed.
Oct. 15, Agreed statement of evidence lodged.
Oct. 21, Praecipe filed, proof of service thereon.
Oct. 21, Agreed statement of evidence approved and ordered filed.

Petition.

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UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

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The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT: AR: A-1: KHD—60D) dated December 9, 1933, and as the basis of his proceeding alleges as follows:

I. The address of the petitioner is 440 Park Avenue, New York, New York. His principal place of business is at Municipal Building, New York, New York.

II. The notice of deficiency (a copy of which 9
is attached hereto and marked "Exhibit A") presumably was mailed to the petitioner on December 9, 1933.

III. The taxes in controversy are income taxes for the calendar year 1931 and are for $256.27.

IV. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The inclusion in income of the sum of $14,000. as salary.

10 *Petition.*

(b) The determination that the salary received by the petitioner as Chief Engineer of the Bureau of Water Supply of The City of New York constitutes income taxable by the United States Government.

(c) The failure to determine that the petitioner received salary as an officer of The City of New York.

(d) The determination that the petitioner was during the year 1931 not engaged in the exercise
11 of an essential governmental function of the City of New York.

(e) The determination that the salary of the petitioner paid by the City of New York is taxable by the United States Government if he does not exercise an essential governmental function.

(f) The disallowance of a deduction of $276.33 as a business expense or a loss sustained in a transaction entered into for profit.

(g) The failure to allow as a deduction the difference between the amount of rent paid by
12 the petitioner and the amount received from the sub-tenant of his property.

V. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is an individual residing at 440 Park Avenue, New York, New York. During the year 1931 he was Chief Engineer of the Bureau of Water Supply of the City of New York. He was an officer of the City of New York, holding office by virtue of statutory authority. His salary of $14,000. received in the year 1931 was paid by the City of New York.

(b) The petitioner during the year 1931, as an officer of the City of New York, had supervision over the engineering details connected with the supplying of water to the City of New York for public purposes and the supplying of water to consumers thereof residing in the City of New York.

(c) Prior to the year 1931 the petitioner leased an apartment. This apartment was sub-let to another tenant and the petitioner received income therefrom. The difference between the income received by the petitioner and the amount expended as rent for the apartment was $276.33, which constituted a deductible loss.

WHEREFORE your petitioner prays that this Board may hear this proceeding and determine that the salary of $14,000. received by the petitioner in the year 1931 is not subject to tax by the United States Government and that the sum of $276.33 constituting the difference between the amount paid by the petitioner as rent and the amount received by the sub-letting, constitutes a deduction from income, and for such other and further relief as the Board may deem proper in the premises.

Respectfully submitted,

MARK EISNER,
Attorney for Petitioner,
20 Exchange Place,
New York, New York.

16 *Exhibit A, Annexed to Petition.*

State of New York, }
County of New York, } ss.:

WILLIAM WHITLOCK BRUSH, being duly sworn, deposes and says: That he is the petitioner above-named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

WM. W. BRUSH.

Sworn to before me this 5th }
17 day of February, 1934. }

C. SULLIVAN, JR.,
Commissioner of Deeds,
City of New York,
residing in Kings County.
New York Co. Clerk's No. 188, Reg. No. 75-S-4.
Kings Co. Clerk's No. 213, Reg. No. 4048.
Commission Expires May 3, 1934.

Exhibit A.

TREASURY DEPARTMENT
18 WASHINGTON

Office of
Commissioner of Internal Revenue

Dec. 9, 1933

IT: AR: A-1
KHD-60D

Mr. William Whitlock Brush,
440 Park Avenue,
New York, New York.

Sir:

You are advised that the determination of your income tax liability for the year 1931 discloses a

deficiency of $256.27 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, which ever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest at the rate of 6% per annum will accumulate.

Respectfully,

GUY T. HELVERING,
Commissioner

By CHAS. T. RUSSELL
Deputy Commissioner

Enclosures:

Statement
Form 870

22 *Exhibit A, Annexed to Petition.*

STATEMENT

IT: AR: A-1
KHD-60D

In re: Mr. William Whitlock Brush,
440 Park Avenue,
New York, New York.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
23 1931	$256.27	None	$256.27

This deficiency in tax is based upon the report submitted to this office, by the Internal revenue agent in Charge, now located at Room 807, United States Parcel Post Building, 341 9th Avenue, New York, New York, under date of February 28, 1933 and other information on file which discloses the deficiency in tax as stated above, determined as follows:

Net loss originally reported on return	($121.55)
Add:	
24 1. Salary	14,000.00
2. Reduction in loss on rents	276.33
Corrected tofal net income	$14,154.78

Explanation of Changes

1. This office holds that the salary of $14,000.00 received by you "as Chief Engineer of Water Supply, City of New York" represents taxable income in accordance with the provisions of article 643 of Regulations 74 which provides in part as follows:

Exhibit A, Annexed to Petition.

"Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

"An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed services and not the accomplishment of specific objects, and whose services are continuous, not occasional or temporary. * * *"

It is held that the supplying of water by water plants to the residents of a community constitutes the discharge of a proprietary function as distinguished from an essential governmental function, consequently the compensation of the officers and employees of such plants is subject to Federal Income Tax.

28 *Exhibit A, Annexed to Petition.*

In the case of Flint *vs.* Stone Tracy Company, 220 U. S. 107, the United States Supreme Court stated:

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium or private corporations, and though the public may derive a benefit from such
29 operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.
>
> "The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities
30 which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes, the latter, although regulated by the state, the exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation."

Your attention is directed also to the decision of the United States Board of Tax Appeals in the case of C. S. Denman, Volume 27, page 256.

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2. The deduction of $276.33 claimed in schedule B of your return representing a loss sustained from the subletting of your private apartment, has been disallowed inasmuch as it is held to represent a personal expense.

Computation of Tax

Adjusted net income		$14,154.78
Less:		
Dividends	$ 303.52	
Personal Exemption	3,500.00	3,803.52
Income subject to normal tax		$10,351.26
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on 4,000.00		120.00
Normal tax at 5% on 2,351.26		117.56
Surtax on $14,154.78		43.10
Total		$340.66
Less:		
Earned income credit computed on $14,000.00 earned income (limited to ¼ of the normal tax on the net income plus ¼ of the surtax on the earned net income)		$ 84.39
Income tax liability		$ 256.27
Income tax assessed		None
Deficiency		$ 256.27

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At the conference held in this office August 15, 1933, you were granted the opportunity to submit certain additional information in support of your

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contentions with regard to the taxability of the salary referred to above but the same has not been submitted, therefore, this office is of the same opinion as reached at the conference.

A copy of this communication has been mailed your representative Mr. Mark Eisner, 20 Exchange Place, New York, New York, who has on file in this office a duly recorded power of attorney.

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Answer.

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

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Now comes the Commissioner of Internal Revenue, by his attorney, General Counsel, Bureau of Internal Revenue, and for answer to the petition of the petitioner, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are income taxes for the year 1931, but denies the remaining allegations contained in paragraph III of the petition.

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IV. Denies that the respondent erred as alleged in paragraph IV of the petition, subparagraphs (a) to (g) inclusive.

V. Denies the allegations of fact contained in paragraph V, subparagraphs (a) to (c), inclusive, of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied. 38

(Signed) ROBERT H. JACKSON.

ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

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Memorandum Opinion.

UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

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MARK EISNER, Esq., JOSEPH L. WEINER, Esq., PAUL WINDELS, Esq., and EDMUND L. PALMIERI, Esq., for the petitioner.

JAMES H. YEATMAN, Esq., for the respondent.

LEECH: This proceeding seeks redetermination of a deficiency of $256.27 determined for the year 1931. There is only one issue, this being whether petitioner is exempt from income tax upon a salary received from the City of New
42 York as compensation of an officer or employee rendering service to the city in its governmental capacity.

The petitioner during the calendar year 1931 was employed as Chief Engineer of the Bureau of Water Supply of the City of New York. He has been so employed for 36 years. This is a statutory office. His duties as Chief Engineer included the protection of the water supply of New York City from pollution, the determination of the amount of water to be withdrawn from various sources, the operation of the municipal water system, supervision of personnel,

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all matters connected with the expenditure of moneys allocated for water supply purposes and the preparation of plans, surveys and reports on improvements and installations of the water supply system.

In the early days of New York City water was furnished its citizens by private companies. In certain areas water is furnished and sold by private companies at the present time. The present water supply system of New York has been built up through the years by the construction of facilities by the city and the acquisition from 44
time to time of private companies supplying certain areas.

Water furnished by the city for business use is metered and the amount used is charged at a fixed rate. Water for private use is furnished on a flat annual sum basis which is determined in accordance with the conditions that exist with respect to the particular residence served. Approximately 75 per cent of the cost of maintaining and operating the water system of New York City is attributable to the furnishing of water for business and private use; approximately 25 45
per cent is attributable to fire protection, street sprinkling and flushing, sewer flushing, supervision of private companies and the supplying of water to communities outside of New York City.

The municipal water system of New York City has entailed an enormous expense. The cost of the facilities for bringing water from the Catskills involved an expenditure of more than two hundred million dollars. A plan for additional water supply now under consideration contemplates an expenditure of two hundred and twen-

46 ty-five million dollars. The sources of water supply of the several private companies now serving some of the outlying sections of the city are now nearing a condition of exhaustion. The water furnished by these companies is inferior to the water supplied by the municipal system. It is anticipated that the public will insist that these privately served areas be taken over shortly by the city and added to the municipal water system.

Petitioner contends that the operation of the
47 municipal water system by the City of New York is the exercise of a governmental function and that petitioner's services to the city are performed in its exercise of such function and, consequently, the salary received is exempt from Federal taxation upon the ground that the exaction of such tax would impose a burden upon the city in its governmental capacity in violation of the rule recognized by many decisions. *McCulloch* v. *Maryland*, 17 U. S. 315; *Texas* v. *White*, 74 U. S. 700; *Collector* v. *Day*, 78 U. S. 113; *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570; *Burnet*
48 v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

We have considered this question in several instances and have consistently held that in the operation of a water system a municipality is acting in its corporate or proprietary character and not in a governmental capacity. *C. S. Denman*, 27 B.T.A. 256; affirmed *Denman* v. *Commissioner*, 73 Fed. (2nd) 193; *T. P. Wittschen*, 25 B.T.A. 46. In *Blair* v. *Byers*, 35 Fed. (2d) 326, it was held that an attorney employed and paid by the Des Moines Municipal Water Works is not entitled to exemption from Federal Tax upon his salary received in that employment, as the

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operation of a municipal water works was not the exercise by the city of a governmental function. See also *Illinois Trust and Savings Bank* v. *City of Arkansas City*, 76 Fed. 271; *Pikes Peak Power Company* v. *City of Colorado Springs*, 105 Fed. 1; *Omaha Water Company* v. *City of Omaha*, 147 Fed. 1.

It is contended by petitioner that a different situation is shown in the present case calling for a different conclusion, as the question of furnishing water to the population of New York City is one of such magnitude that it can necessarily 50
be done only by the city itself as the immensity of the task precludes its being performed by a private company or companies.

We do not see that a distinction could be made merely upon the basis of the size of the municipality. Such a rule would be impossible of application. Where to draw the line would be impossible, or, at least, impracticable to determine. We think the principle announced in the cited cases applies with equal force irrespective of the size of the municipality involved.

The deficiency in issue arises through respond- 51
ent's action in including in petitioner's gross income his salary received as Chief Engineer of the water supply of the City of New York. We find no error in respondent's action.

Enter:

Judgment will be entered for the respondent.

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Decision.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

WILLIAM WHITLOCK BRUSH, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

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Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 14, 1935, it is

ORDERED and DECIDED: That there is a deficiency of $256.27 for the year 1931.

Entered June 15, 1935.

(Signed) J. RUSSELL LEACH,
Member.

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Statement of Evidence.

UNITED STATES BOARD OF TAX APPEALS.

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The following is a statement of the evidence in narrative form in the above entitled case. The case came on for hearing before the HONORABLE J. RUSSELL LEECH, Member of the United States Board of Tax Appeals, at Washington on the 24th day of May, 1934. The appearances were:

JOSEPH L. WEINER, Esq., of New York City on behalf of the Petitioner.

ROBERT H. JACKSON, Esq., General Counsel, Bureau of Internal Revenue, by JAMES H. YEATMAN, Esq., on behalf of the Commissioner of Internal Revenue. 57

STATEMENT OF CASE FOR PETITIONER.

Mr. Weiner: This case involves an alleged deficiency of income taxes for 1931, and the issue is whether the services rendered by the petitioner were services performed for a municipality, the City of New York, by which he was employed, in a governmental capacity. A very similar issue was decided in the *Denman* case, 27 B. T. A. 256. There was some difference between this case and

58 *William Whitlock Brush, direct.*

the *Denman* case, and I will ask the petitioner to take the stand.

STATEMENT OF CASE FOR RESPONDENT.

Mr. Yeatman: There is no question but that this Petitioner is an employee of the City of New York. The sole question before the Board is whether the supplying of water to the City of New York is a governmental function, and, as Counsel stated, that was decided in the case of C. S. Denman *vs.* The Commissioner of Internal
59 Revenue, 27 B. T. A. 256, and several other cases, one by the Board and several by the courts in particular one by the Supreme Court, 220 U. S. 107.

WILLIAM WHITLOCK BRUSH, petitioner, was called as a witness in his own behalf and after being duly sworn testified as follows:

Direct Examination.

I am the petitioner in this proceeding and in the year 1931 I was a civil engineer employed by
60 the City of New York as Chief Engineer of Water Supply and in the Bureau of Water Supply, Department of Water Supply, Gas and Electricity of the City of New York. I was not substantially engaged in any other occupation. I did a small amount of work that was under my direction, as civil engineer and that was all. Up to the year 1931 I had been in the employ of the City of New York for about 36 years having taken several competitive examinations for Civil Service appointments and received appointments from the classified Civil Service lists. I was in the City's employ under such classified Civil Service

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for many years. Finally I received an appointment to the position which I held in 1931. I was a member of the City Retirement System. In the course of my duties I became familiar with the method of operation of the Department of Water Supply.

Of the expenses of the Department in 1931, 25.2% were allocated to public service, *i.e.*, service other than furnishing water to private consumers. The figure 25.2% was divided as follows: 11.8% to fire protection service; 6% to street cleaning and street flushing service; 5% to furnishing 62
water for public buildings and public use without charge; .2% to the supervision of private water companies; 2.2% to the furnishing of water to communities other than the City of New York. Water is furnished to outside communities pursuant to statutes which specifically prescribe the charge that the City may make to such other municipality. This charge is limited to the actual cost of collecting and delivering the water outside of the City.

In 1931 my duties as Chief Engineer of Water Supply were as follows: 63

In connection with the collection and storage of the water supply, my duties included the protection of the water supply from pollution, the purification of the water to free it from or to destroy polluting matter that may have entered the water supply, the determination of the amount of water to be drawn from the various sources, and the operation of the various parts of the system, for the retention of water for future use, the transportation of the water, the amount of water to be delivered through the various conduits and the treatment of the water

64 in transit and within the City limits, the delivery of the water to the various parts of Greater New York, the pumping of the water to the extent required to furnish adequate pressure, and the use of the water, both inside and outside of buildings;

As to the delivery of the water, prevention of waste and so forth, the maintenance and the operation of the high pressure fire service systems, of which there are three in Greater New York, the supervision of the personnel and mat-
65 ters connected with the expenditures of moneys allocated for water supply purposes, the preparation of plans, surveys and reports on improvements and extensions to the water supply system generally, exclusive of those for the large increase in water supply, which is allocated to the Board of Water Supply;

The preparation of plans and specifications for the extension of the distribution system, and to improve the distribution system, supervision as to the adequacy of water available and distribution of water charges for fire protection and in
66 the areas which are supplied by private water companies within the limits of Greater New York. The preparation of agreements with communities outside of Greater New York for the delivery of water to those communities, as well as the determination of the cost of the supply and the resultant rate to be charged.

I was paid my salary in 1931 by the City of New York.

As to the financial operations, the revenues collected by the Department were turned over to the General Tax Fund of the City of New York; the expenses of the department were met

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from the moneys raised by the budget or tax levy of the City of New York, and that included my salary.

The cost of the New York City Water Supply System up to the year 1931 was approximately $480,000,000. The reproduction cost of the system would be substantially higher than that sum. The major water supply project undertaken by the Greater City since its incorporation in 1897 was the furnishing of Catskill water to the City of New York. The cost of that project was slightly in excess of $160,000,000. exclusive of the 68
second so-called city tunnel which increased the cost to about $225,000,000. The planning of that project was commenced in 1905. Other considerable projects are now being investigated and contemplated to increase the water supply of the City, of which the most substantial is the proposed Delaware System to secure water from the Delaware sources. The estimated cost of this project will be in excess of $225,000,000.

Mr. Yeatman: If your Honor please, I do not know just what the estimates or future operations of the City Water Department have to do 69
with this case, and I am just wondering what counsel for petitioner is leading up to or else I would object to it at this time.

The Member: Of course, everything that is now in the record is without objection, but we are unable to see, ourselves, the materiality.

Mr. Weiner: The purpose of this testimony, if your Honor please, is to show that the furnishing of water to the City of New York involves projects of such magnitude and problems of such scope that it would be well nigh impossible for

70 any private company to undertake them, and our point is that the City of New York in engaging in that furnishing of water, was engaging in an undertaking which it was compelled to engage in, because of the utter impossibility of securing future water supply for a city of this size, and in view of the problems which the City has to face through any private company.

The Member: That is to say it is your position that the furnishing of water to a city the size of New York is a proposition of such magni-
71 tude, financially and otherwise, that it is necessarily a governmental function because it could not be done by private individuals?

Mr. Weiner: That is one phase of it, yes, your Honor. We propose to show in connection with this Delaware project, that the carrying out of that project has been a subject of litigation between the States of New York, Pennsylvania and New Jersey, before the United States Supreme Court, in which the Supreme Court had to lay down special rules, governing the rights of ad-
gage in, because of the utter impossibility of
72 jacent States in a water supply, and litigation in which no private company could have participated, and in which the rules applicable to the litigation were created by the Supreme Court, based on the ordinary principles of common law and based on the principles of equity which should, in the opinion of the Supreme Court, maintain as between sovereign States. The litigation was extremely exhaustive. There is an opinion of the Supreme Court, and a very substantial report of the Special Master appointed by that court in connection with that project which illustrates the character of the problem involved.

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The Member: Proceed.

Mr. Weiner: I should like, at this point, to make a part of the record, either by offering a copy, or by reference, the opinion or report of Charles M. Burch, Special Master in the matter of State of New Jersey, plaintiff, *vs.* State of New York and City of New York, defendants. Commonwealth of Pennsylvania, Intervener, No. 16 original.

Mr. Yeatman: Is that offered in evidence?

Mr. Weiner: Yes.

Mr. Yeatman: I object to the tender.

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Upon objection the Board refused the tender, granting permission to the petitioner to call the attention of the Board to the documents or any part thereof in petitioner's brief.

Cross-Examination.

The City of New York has always furnished the water for its own use and for the use of its inhabitants so far as its major sources of supplying areas are concerned. That is, the old City of Brooklyn and the old City of New York have always been furnished with a public water supply except that in New York, prior to about 1833 or 1830, there was a small system that was installed and operated by a private company, which served water to the City and also to the citizens. That was for just that early period of New York City's existence. There are areas today supplied by private companies within Greater New York. The City of New York includes five boroughs. The County of Bronx, known as the Borough of the Bronx; the County of New York, known as the Borough of Manhattan; the County of Kings, known as the Borough of Brooklyn; the County

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76 of Queens, known as the Borough of Queens, and the County of Richmond, known as the Borough of Richmond.

In the Borough of Brooklyn there is the Flatbush territory which was the old town of Flatbush, and now is the 29th Ward of the Borough of Brooklyn, is today furnished with water by a private company. That represents about one-tenth of the population of that borough. In other words about 240,000 people in the City of Brooklyn are supplied with water by a private corpo-
77 ration which sells the water to them.

As to that water, I supervise the quality, the adequacy of the volume of water available, to meet the demands of that area, the adequacy of the distribution system and the sufficiency of the hydrants that are installed, for fire extinguishment, and other public uses and the charges made for water supply for public uses, and in general, perform the general supervision over the supplying of water to that part of the inhabitants of Brooklyn that get the water from the private company, exclusive of domestic rates, with which
78 we have nothing to do.

This private corporation acquired the right to furnish water under an agreement with the officials of the former town of Flatbush, before it became part of Brooklyn, and the supplying of the water was fixed by the terms of that agreement and an act of the legislature authorizing the continuance of the furnishing of water after the consolidation.

That corporation does not have to pay anything to the City of Brooklyn or the City of New York, for being allowed to sell this water to citizens, as an actual sale of water. They are

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subject to the usual tax provisions, but not any special charge or payment for the privilege of selling water.

The Borough of Bronx does not have a private company operating a water supply system. In the Borough of Queens there are two private water companies that are of substantial size and two that are supplying just a few customers. One is a subsidiary of the Long Island Railroad Company and is used almost exclusively for supplying the needs of the railroad. They may have perhaps a half dozen customers. The other small 80
company is a company that operates as part of the terms of lease that it holds from the City of New York for what is known as Broad Channel Island, where the company is authorized to furnish a water supply for domestic use and fire protection in the area covered by the lease. These companies come under my supervision, although that supervision is rather small because of the slight public use of that water supply.

The salary paid to me is in connection with my services rendered for all the boroughs constituting the Greater City of New York. There 81
is no direct contribution by the other boroughs to the operation of the Water Supply System, that is, none of the revenues derived from the sale of water is used as such for the maintenance or operation thereof.

The charge for water is determined as follows: For business use a City ordinance requires a meter to be placed on each pipe delivering water from the Public Water Supply System into the premises and the consumer pays according to what the meter shows; the domestic portion is almost universally supplied on the so-called

82 frontage rate where a charge is set up on the size of the building, the number of families, the number of certain types of fixtures and the number of other elements determining the volume or usage irrespective of the size of the building; that is, the residential portion is furnished on a flat annual sum basis, determined by the conditions that exist with respect to each residence.

The charges are paid to the City Collector, which is a branch of the Department of Finance in the City of New York, and are not collected
83 by the Water Department. The Water Department collects a small amount of money for municipal use, some of which is for the sale of water and some for the use of water under the control of the Water Department:

The percentage of the expenses of the department as applied to different departments of the Water Supply or divisions of the Water Supply, was as follows: The percentage for fire protection was 11.8 per cent.; for street sprinkling and flushing and flushing of sewers, 6 per cent.; for other public use, delivering water where no pay-
84 ment is made, 5 per cent.; for the supervision of the private water companies, exclusive of the fire protection feature of their work, .2 per cent.; and for the water supplied to the communities outside of New York City, under the laws governing the furnishing of such water, 2.2 per cent.; making a total of 25.2 per cent.

The other 75 per cent. goes for furnishing of water for the business use and for domestic purposes of those who reside in New York City and are not supplied in those areas where private companies furnish a supply to a restricted area.

85

Redirect Examination.

Of the total water sold to private consumers by the City of New York, in round figures, 25 per cent. is sold under meter service and 75 per cent. under flat charge. From that 75 per cent. there is deducted that which is not paid for or which is for public use.

As previously mentioned, certain private companies serve limited areas of the Boroughs of Brooklyn and Queens but there are no private companies furnishing water in any of the other boroughs. There were at different times numerous private water companies serving limited areas within what is now the Greater City of New York but these were, from time to time, absorbed into the City System.

86

Q. And to your knowledge was that the result of public demand for such absorption?

Mr. Yeatman: I object.

The Member: Objection sustained.

Mr. Weiner: Exception,

The Member: Exception noted.

87

Q. To your knowledge has objection been made to any phase of the service of such private companies as are still furnishing water within the limits of the Greater City?

Mr. Yeatman: I object to that, too, your Honor, as irrelevant, immaterial and incompetent. I don't see what it has to do with this case.

The Member: How has that any bearing on the issue?

Mr. Weiner: My point is to show, your Honor, that the private companies, within the City of

88 New York, do not furnish water or the quality or pressure or, in some cases, at the prices charged by the City of New York, and that it is the result of the insistence of the citizens of New York that the City furnish them with water of the quality supplied by the municipal water department and of the pressure supplied by the municipal water department, that has caused the absorption of these private companies. The City has not—and I propose to give certain figures on that in a moment—engaged in this enterprise for
89 profit, and it has been moved to do so, first by necessity, in so far as total volume is concerned, which could not be supplied by private companies, and also from the fact that the private companies have not supplied satisfactory service, according to such supervision as the City has had authority to impose upon them.

The Member: Suppose that the City of New York were dissatisfied with the drugstore service they were receiving in the city and they adopted an ordinance and proceeded to organize and furnish to city-owned drugstores drug service, would
90 the fact, or either of the facts, that you referred to a few moments ago as to which you have directed questions to the witness, that the reason for the absorption by the city of the small water companies furnishing water to these districts into the municipal owned system, was the unsatisfactory service and the price charged for the private-furnished water—do you think that a similar reason in the case of the drug industry, would make it a governmental function?

Mr. Weiner: I do not believe that question was entered into, your Honor. The water supply,

91

in ordinary times, or in modern times, is almost unique.

The Member: We will agree that there is a difference in the furnishing of drugs and that of water, but what we cannot see, for the moment at least, is how the objection by a number of people to the service furnished by a private company has anything to do with the characterizing of the function as a governmental rather than as a proprietary function.

Mr. Weiner: If the private companies find themselves unable, as I believe most of the companies now serving in New York today are unable to furnish water of a requisite quality and of a requisite pressure, in order to supply the citizens of the city at the present time with such service as we believe they are entitled to and as we believe is furnished elsewhere, then, in our judgment it becomes our duty to see that service is furnished, and if the only available means of supplying it is by the municipality, we think it is the duty of the city.

92

The Member: Objection overruled.

To my knowledge objection has been made to a phase of the service of such private companies as are still furnishing water within the limits of the Greater City.

93

Q. In your judgment, Mr. Brush, is the quality of water supplied by a private company in New York City equal to the quality of water supplied by the City of New York?

Mr. Yeatman: I object to that, for the same reason that I objected to the last question. I cannot see where it is relevant.

94 *William Whitlock Brush, redirect.*

The Member: How far do you expect to go, Mr. Weiner?

Mr. Weiner: Just about two or three more questions.

The Member: Objection overruled, and exception noted.

The quality of the water supplied by the private companies is not equal to that furnished by the City of New York. In the case of the Flatbush Company all of the supplies are from local
95 sources, that is, water taken from under the ground in the immediate vicinity of the consumer, the limit of the available supply has been passed, and the supply has reached the point where it is essential that some action be taken to substitute some other source of supply in the very near future. In Woodhaven it is very rapidly reaching a situation similar to Flatbush. In the other areas, the time is further off but the situation is one where ultimately it will all have to be done, because they are all local sources under the ground, and they are hard waters, waters high in chlorine.

96 In my judgment as an Engineer there is very close relation between water supply and sewage disposal. The amount of water to be disposed of as sewage is almost exactly the amount of water which is furnished by the water supply for the community less the amount that is used for irrigation and similar purposes which does not reach the sewer. There is also a relation between the disposition of sewage and the sources of water supply. The question of how the sewage is disposed of has a very vital effect on the question of the potability or purity of the water supply and its suitability for human consumption.

William Whitlock Brush, recross.

97

Q. Are you able to state the total receipts derived by Greater New York City from the supply of water, and the total expenses incurred in such supply?

A. For the year 1931?

Q. No, since the Greater City was formed.

Mr. Yeatman: I object to that. I think he can state what they were in 1931, but I do not think that anything after that is material. The year is 1931.

Mr. Weiner: I will be glad to state both the figures for 1931 and the aggregate, including that period. My point is simply to show that the City of New York has spent more for the furnishing of the water than its actual receipts and up to the end of 1932, approximately $4,000,000.

98

The Member: Objection overruled.

From the time the Greater City was formed to the end of 1931 receipts in connection with the water supply were about a half million dollars less than the expenditures connected with the furnishing of the water supply for New York City based on the annual charges, and not on the construction charges which are not included. For the year 1932 there was a deficit of about $1,000,000; and for the year 1933 a deficit of about $7,000,000.

99

Re-cross Examination.

In 1931 alone there was as I recall a deficit of a few hundred thousand dollars.

Q. You stated that there was direct relationship between water supply and sewage. Did I understand you to say that?

A. Yes.

William Whitlock Brush, recross.

100

Q. By that you mean that what water goes into a system naturally has to come out?

A. Yes.

The water furnished by private companies is not equal to the quality of the water furnished by the City itself. I supervise the water furnished by these private companies. I have not undertaken to make that water of as good quality as the water furnished by the City as to its suitability or desirability for domestic supply, but as to its sanitary quality. There is no question that water

101 is of satisfactory sanitary quality. It does not endanger the health as far as its bacteriological contents are concerned.

Both sides rest.

The foregoing evidence is all of the material evidence in use at the hearing before the Board of Tax Appeals and the same is hereby approved by the undersigned.

PAUL WINDELS,
Attorney for the Petitioner.

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ROBERT H. JACKSON, Esq.,
General Counsel,
Bureau of Internal Revenue, as
Attorney for the Commissioner of Internal Revenue.

Approved and ordered filed this 21st day of Oct., 1935.

(s) J. RUSSELL LEECH,
Member.

Petition for Review.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Circuit Court of Appeals for the Second Circuit:

Your Petitioner, William Whitlock Brush, respectfully shows:

FIRST: This is a proceeding for review by the United States Circuit Court of Appeals for the Second Circuit of a decision of the United States Board of Tax Appeals entered on the fifteenth day of June 1935 adjudging that there is a deficiency of $256.27 for the year 1931 in the income taxes reported on the Petitioner's income tax return for the said calendar year.

SECOND: The Petitioner is an individual now residing at 528 West 238th Street, in the City and State of New York. Petitioner's tax return for the year 1931 was made to the Collector of Internal Revenue, Third District, State of New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

106 *Petition for Review.*

THIRD: The nature of the controversy before the Board of Tax Appeals was the determination of the Petitioner's income tax for the year 1931 and involves the determination of

(1) The question of whether the Commissioner of Internal Revenue was in error in adding to and including in Petitioner's income for 1931, as subject to taxation, a salary of $14,000 paid the Petitioner as Chief Engineer of the Bureau of Water Supply by the City of New York, and in
107 disallowing Petitioner's claim that the said salary income was exempt and immune from taxation by the United States Government.

FOURTH: The errors committed by the Board of Tax Appeals upon which the Petitioner relies as the basis of this proceeding are as follows:

(1) The Board erred in its conclusion that there is a deficiency of $256.27 in Petitioner's tax for 1931 and in sustaining the determination of the Commissioner of Internal Revenue to that effect.

108 (2) The Board erred in failing to reverse the determination of the Commissioner of Internal Revenue that there was a deficiency in Petitioner's tax for 1931.

(3) The Board erred in refusing to find that the Commissioner of Internal Revenue was in error in adding to and including in Petitioner's income for 1931, as subject to taxation, the compensation paid to the Petitioner as Chief Engineer of the Bureau of Water Supply by the City of New York; and in disallowing Petitioner's claim that the said salary income was exempt and immune from taxation.

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(4) The Board erred in its conclusion that Petitioner's compensation paid by the City of New York for the year 1931 was not exempt and immune from taxation and deductible from Petitioner's taxable income.

(5) The Board erred in refusing to find that Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of an essential governmental function and as such exempt and immune from taxation by the United States government.

110

(6) The Board erred in refusing to find that Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of usual, necessary and/or proper governmental functions and as such exempt and immune from taxation by the United States Government.

(7) The Board erred in refusing to find the Petitioner's salary compensation was for services rendered by an officer of a political subdivision of the State of New York in connection with the exercise of a public function and as such exempt and immune from taxation by the United States government.

111

(8) The Board erred in failing to find that the public service rendered by, and the magnitude of the operations of the City of New York in connection with its water supply system and in supervising, protecting, installing, improving and controlling the same and the practical public need for such functioning by the City of New

112

York constitutes such service and operations a necessary and essential governmental function and as such, in all respects, exempt from interference on the part of the United States Government by taxation of either its operation or personnel.

(9) The Board erred in failing to find that the City of New York was performing an essential and/or proper governmental function in operating, maintaining, supervising, and controlling its system of water supply.

113

10) The Board erred in failing to find that by reason of the error assigned in the next preceding paragraph the compensation of the Petitioner for services in connection with the aforesaid governmental function was exempt and immune from taxation by the United States Government.

(11) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary received from the City of New York constitutes an interference with and burden upon the City of New York, a political subdivision of a sovereign state, and an instrumentality thereof by the United States Government.

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(12) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary received from the City of New York constitutes an interference with and impairment of the appropriate exercise of its governmental function by the City of New York, a political subdivision of a sovereign state by the United States Government.

(13) The Board erred in failing to find that the imposition of a tax upon Petitioner's salary re-

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ceived from the City of New York constitutes an impairment of and interference with the appropriate exercise of a governmental function by the City of New York for the citizens thereof and in the interest of the health and public welfare of the People of the State of New York, by the United States Government.

(14) The Board erred in failing to find that the City of New York in all respects treated its operation, maintenance and supervision of a water supply system and all the incidents, including expense and income, thereof, as a governmental function.

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(15) The Board erred in failing to find that a sovereign state and the political subdivisions thereof may determine for themselves the scope of their governmental function.

(16) The Board erred in failing to find that the performance of such function by the City of New York pursuant to its determination of the scope of its governmental functions as set forth in the two next preceding paragraphs cannot be interfered with, or impaired by taxation by the United States Government.

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(17) The Board erred in rendering decision for the Respondent.

WHEREFORE: Your Petitioner prays that this Court may review the action of the Board of Tax Appeals in this Court, reverse the decision of the Board and direct the entry of a decision by said Board in favor of the Petitioner determining that there is no deficiency in income taxes for the year 1931 due from the Petitioner and for such

118 *Petition for Review.*

other further and different relief as may to this Court appear proper in the premises.

WILLIAM WHITLOCK BRUSH.

PAUL WINDELS,
Attorney for Petitioner,
Municipal Building,
Borough of Manhattan,
New York City.

UNITED STATES CIRCUIT COURT
119 OF APPEALS,
FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

120 State of New York, }
County of New York, } ss.:

WILLIAM WHITLOCK BRUSH, being duly sworn, deposes and says: That he is the petitioner above named and that he has read the foregoing petition and knows the contents thereof and that the statements therein contained are true to the best of his knowledge and belief and that said petition is filed in good faith.

WILLIAM WHITLOCK BRUSH.

Subscribed and sworn to before me }
this 5th day of September, 1935. }

FREDERICK W. HAUPTMAN,
Notary Public,
New York Co.

Praecipe.

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UNITED STATES BOARD OF TAX APPEALS.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *v.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

To the United States Board of Tax Appeals: 122

You will please prepare within sixty (60) days from the date of the filing of the petition for review in the above entitled case and transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. Transcript of docket entries.
2. Pleadings before the Board.
   Petition with letter and statement annexed.
   Answer to petition.
3. Opinion. 123
4. Decision of the Board.
5. Petition for Review.
6. Statement of evidence as settled.
7. Praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, this 14th day of October, 1935.

PAUL WINDELS,
Attorney for Petitioner,
Municipal Building,
New York, N. Y.

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Clerk's Certificate.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

WILLIAM WHITLOCK BRUSH, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 74815.

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I, B. D. GAMBLE, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 40 inclusive contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of
126 Tax Appeals at Washington in the District of Columbia this 30th day of October, 1935.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(24715) 127

Opinion.

UNITED STATES CIRCUIT COURT
OF APPEALS,

FOR THE SECOND CIRCUIT.

WILLIAM WHITLOCK BRUSH,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 128

Before—MANTON, L. HAND and CHASE,
Circuit Judges.

Petition to review a decision of the Board of Tax Appeals upholding the action of the Commissioner of Internal Revenue in including in the taxable income of the petitioner for the calendar year 1931 the salary he received in that year from the city of New York as chief engineer of its Bureau of Water Supply. Affirmed.

129 COTTON, FRANKLIN, WRIGHT & GORDON, of New York City (BOYKIN C. WRIGHT and CHARLES C. PARLIN, both of New York City, of Counsel), for Petitioner.

FRANK J. WIDEMAN, Asst. Atty. Gen., and SEWALL KEY and JOSEPH M. JONES, Sp. Asst. to Atty. Gen., for Respondent.

JOHN J. BENNETT, JR., Atty. Gen., of State of New York, HENRY EPSTEIN, Sol. Gen., of State of New York, of Albany, N. Y., and PAUL WINDELS, Corp. Counsel, of New York City (JULIUS HENRY COHEN and AUSTIN J. TOBIN, both of New York

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City, on the brief), for the State of New York.

July 13, 1936.

CHASE, Circuit Judge:

The deficiency in controversy was created by including in the 1931 taxable income of the petitioner the salary he received in that year from the city of New York as compensation for his services as the chief engineer of its Bureau of Water Supply. It was taxed in supposed com-

131 pliance with the provisions of section 22 of the Revenue Act of 1928 (45 Stat. 791 [26 U. S. C. A. §22 and note]) defining "gross income" to include "gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid," and T. R. 74 Art. 643, which recognizes the immunity from federal taxation of the compensation "paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political sub-

132 division * * *."

During 1931, the petitioner was regularly employed, as he had been previously for many years, by the city of New York as the engineer in charge of its Bureau of Water Supply. This was a statutory office for which he had duly qualified. He was paid a fixed salary and was charged in general with the responsibility for supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants. The water for public and private use in that city for the most part, though not wholly, comes from an enormous system owned by the city which has cost

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about half a billion dollars and which must be still further enlarged to meet the ever growing demands upon it. Petitioner's duties require him to make surveys, plans and reports relative to improvements and enlargements of the system as well as to maintain in good condition the reservoirs, mains and equipment already possessed.

The carrying charges are paid from the general funds of the city into which goes all revenue received from the sale of water to private consumers for household, commercial or other use. Large annual deficits in operation have been incurred which have been, or are to be, paid out of the general funds of the city. About twenty-five per cent of the expenses of operation are properly allocated to the furnishing of water for public service, i. e. fire protection; street cleaning and the like; and the remainder to supplying private consumers with water for which compensation is received and carried into the city's general funds.

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The issue presented is whether the supplying of water by the city of New York in kind and quantity sufficient to meet the needs of its inhabitants and itself is such a governmental function that it comes within the implied constitutional immunity from federal taxation which is enjoyed by every state and its political subdivisions.

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It is said with much force in support of the petitioner's claim that his salary may not be taxed by the federal government that the problem of water supply in the city of New York can only be met by the city in the exercise of its governmental power and the use of public money; that the very magnitude of the task makes it essential that the city perform it; and that being so, it has become and is an essential governmental

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function. It has been shown that the supplying of water in the city was in early times partly done at the expense of the municipality and that the city government has increasingly taken over the work until now only a comparatively negligible amount of the total is privately furnished; but it is not equally clear that private enterprise adequately encouraged could not do it as well. To say that it could not in the light of common knowledge as to modern private achievement in business on a vast scale would seem to deny

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probability. In any event such an assertion is not adequately supported by evidence in this record.

As recognized in Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, there is no way to state in terms of general application just what instrumentalities either of a state or of the nation are exempt from taxation by the other. In a federation like ours where two governments, each supreme in its own sphere, exercise sovereign powers in the same territory there must be some measure of accom-

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modation to permit each to exist so supreme. Both must raise revenue by taxation, and each must itself be free from taxation by the other. That neither may tax the other was established as long ago as McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579. And that is still a fundamental principle. Helvering *v.* Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291. See, United States *v.* State of California, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. . Nor where the principle is applicable does it matter that the amount of the proposed tax and the resulting interference with the taxed government is great or small for the immunity is absolute whenever it does exist. Johnson *v.* Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126. But the

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principle itself is limited by that from which it arises, i. e. the need to preserve our dual system of government and does not extend beyond that necessity. Indian Motocycle Co. *v.* United States, 283 U. S. 570, 51 S. Ct. 601, 75 L. Ed. 1277. So where the burden is not direct but only remote it falls within the realm of necessary accommodation and there is no immunity. See Willcuts *v.* Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Fox Film Corporation *v.* Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010.

That the supplying of water by the subdivision 140
of the government of the City of New York from which the petitioner derives the salary which has been taxed is the furnishing to the inhabitants of the city of something indispensable to them cannot be gainsaid. That does not of course mean that the city government must do it either to provide the people with water or, what is closer to the issue here, to exist as a municipal subdivision of the government of the state of New York. Quite as necessary to the well being of the people is an opportunity to purchase an adequate supply of proper food and clothing yet no 141
one would, we suppose, undertake to maintain that if the city government took over that business it would be engaging in an activity necessary to its existence as a government. More nearly at hand, perhaps, is the supplying of gas and electricity but when, if at all, that comes about it will hardly be said that governmental existence as such, required it. On the contrary, due regard must be had to distinguish between those activities which, though impressed with a public interest and sometimes, even often, performed by government are nevertheless done in a proprietary capacity in supplying to the public

142 for a direct charge what it could, and otherwise would, procure from private sources and those services which have become the usual activities of government because purely governmental power is in some degree essential to their performance. When a state government or one of its subdivisions engages, however rightfully, in something beyond that field, and to which but for that extension the federal taxing power would reach, there is no immunity. Helvering *v.* Powers, 293 U. S. 214, 225, 55 S. Ct. 171, 79 L. Ed. 291.
143 The test, however phrased, is one of keeping the federal and state governments in a position to be supreme within the scope of their own sovereignty by keeping the taxing power of each from preventing, or substantially interfering with, the exercise by the other of those powers necessary to its supremacy as a government within its own field.

Consequently it is not enough to make the petitioner's salary immune from federal taxation upon constitutional grounds, when it otherwise falls within the taxing statute passed by congress,
144 that he is engaged in work for which the city pays him, and that it is a necessary part of the cost of the performance of a service which has long been provided by the city to its inhabitants either from choice or convenience. That which is a proprietary function of a state government when undertaken, and so not immune from federal taxation, does not change its character because of its continued exercise. Were that not so every extension of one government into activities over which the taxing power of the other normally extended would to that extent in the course of time curtail the sources of revenue of the other which would be helpless before the

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encroachment. South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. The petitioner's work in furtherance of the supply of water by the city of New York as above outlined and for which he has been paid the salary taxed is not, in the light of the foregoing considerations, part of what his employer has to do to perform its necessary functions as a political subdivision of the state of New York. So the salary of the petitioner was not part of the expense attendant upon the exercise of what may be said to be usual governmental powers, Helvering *v.* Powers supra, or in the doing of what the states have traditionally engaged. United States *v.* California, supra. On the contrary the furnishing of water has been classed as non-essential to the exercise of governmental functions. Flint *v.* Stone Tracy Co., 220 U. S. 107, 172, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Canavan *v.* City of Mechanicville, 229 N. Y. 473, 128 N. E. 882, 13 A. L. R. 1123; In re Water Comrs. of White Plains, 176 N. Y. 239, 68 N. E. 348; Armstrong & Latta *v.* Philadelphia, 249 Pa. 39, 94 A. 455, Ann. Cas. 1917B, 1082; Omaha Water Co. *v.* City of Omaha (C. C. A.) 147 F. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614. Being engaged in work which was a part of the proprietary, or business, activities of the city the petitioner earned a salary which was income to him subject to federal taxation. Denman *v.* Commissioner (C. C. A.), 74 F. (2d) 193; Blair *v.* Byers (C. C. A.), 35 F. (2d) 326. Our decision in Commissioner *v.* Ten Eyck, (C. C. A.) 76 F. (2d) 515, was controlled by the traditional supervision exercised by government over sea ports and stands apart from the decisive features here.

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Affirmed.

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Order for Mandate Filed July 20, 1936.

UNITED STATES CIRCUIT COURT
OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 20th day of July, one thousand nine hundred and thirty-six.

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Present: Hon. MARTIN T. MANTON,
Hon. LEARNED HAND,
Hon. HARRIE B. CHASE, Circuit Judges.

WILLIAM WHITLOCK BRUSH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN,
Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, certify that the foregoing pages, numbered from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

WILLIAM PARKIN,
Clerk.

[SEAL]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 16, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.